

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA, a foreign  
insurer, THE TRAVELERS INDEMNITY  
COMPANY OF CONNECTICUT, a foreign  
insurer,

Plaintiffs,

v.

PRIME PACIFIC BANK, N.A., a  
Washington financial association; PPB  
SUNSET 100 PROPERTIES, LLC, a  
Washington Limited Liability Company;  
SUNSET 121 CONDOMINIUM OWNERS  
ASSOCIATION, a Washington Non-Profit  
Corporation; DEAN STRONG, an individual;  
PETER LAYLIN, an individual; SARA  
LIBERTY LAYLIN, an individual;  
RICHARD PUGH, an individual; LORETTA  
SORENSEN, an individual; and MARCIA  
RIZZUTO, an individual; MORRIS KINNE,  
an individual; KATHERINE ANN KINNE,  
an individual, CHUCK AND JANE DOE  
DODD, individually and as a marital  
community; MEGAN AND JOHN DOE  
REED, individually and as a marital  
community;

Defendants.

Case No. 2:16-cv-01451

**COMPLAINT FOR DECLARATORY  
RELIEF**

Plaintiffs Travelers Property Casualty Company of America and The Travelers Indemnity Company of Connecticut, (hereinafter referred to collectively as “Travelers”), submits the following Complaint for Declaratory Relief.

## **I. PARTIES**

1. Plaintiff TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA is a foreign insurer organized under the laws of the State of Connecticut, with its principal place of business in the State of Connecticut.

2. Plaintiff THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT is a foreign insurer organized under the laws of the State of Connecticut, with its principal place of business in the State of Connecticut.

3. Defendant PRIME PACIFIC BANK, N.A. (hereinafter “PPB”), is a commercial banking association organized under the laws of the State of Washington with a principal place of business in the State of Washington.

4. Defendant PPB SUNSET 100 PROPERTIES, LLC (hereinafter “PPB Sunset LLC”) is a Washington Limited Liability Company with a principal place of business in the State of Washington. The sole member of PPB Sunset LLC is PPB, a Washington citizen.

5. Defendants CHUCK AND JANE DOE DODD (hereinafter “Chuck Dodd”) are Washington residents. All actions or failures to act by Defendant Chuck Dodd were in furtherance of the marital community composed thereof. Defendant Chuck Dodd is Senior Vice President of Defendant PPB and is Member of Defendant PPB Sunset LLC, and at times material, Officer of Sunset 121 Condominium Owners Association.

6. Defendants MEGAN AND JOHN DOE REED (hereinafter “Megan Reed”) are Washington residents. All actions or failures to act by Defendant Megan Reed were in

furtherance of the martial community composed thereof. Defendant Megan Reed is Vice President of Defendant PPB, and is Member of Defendant PPB Sunset LLC and, at times material, Officer of Sunset 121 Condominium Owners Association.

7. Defendant SUNSET 121 CONDOMINIUM OWNERS ASSOCIATION is a Washington non-profit corporation.

8. Defendant DEAN STRONG is an individual who resides in Snohomish County in the State of Washington.

9. Defendant PETER LAYLIN is an individual who resides in Snohomish County in the State of Washington.

10. Defendant SARA LIBERTY LAYLIN is an individual who resides in Snohomish County in the State of Washington.

11. Defendant RICHARD PUGH is an individual who resides in Snohomish County in the State of Washington.

12. Defendant LORETTA SORENSEN is an individual who resides in Snohomish County in the State of Washington.

13. Defendant MARCIA RIZZUTO is an individual who resides in Snohomish County in the State of Washington.

14. Defendant MORRIS KINNE is an individual who resides in Snohomish County in the State of Washington.

15. Defendant KATHERINE ANN KINNE is an individual who resides in Snohomish County in the State of Washington.

## **II. JURISDICTION AND VENUE**

16. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §2201 in that there is an actual and justiciable controversy as to the rights and obligations of the parties named in this matter.

17. This Court has jurisdiction over the parties in this matter pursuant to 28 U.S.C. §1332, *et seq.* in that diversity exists among the parties and the amount in controversy exceeds \$75,000.

18. This action involves a dispute over the application of insurance coverage under insurance policies issued by Travelers Property Casualty Company of America and The Travelers Indemnity Company of Connecticut (hereinafter collectively “Travelers”) to PPB in Washington under and pursuant to the laws of the State of Washington. As a result, venue is properly before this Court.

### III. FACTS

#### A. Background

19. This insurance coverage dispute relates to claims that arise out of the construction and sale of a mixed residential and commercial construction project located at 121 Sunset Avenue North, Edmonds, WA 98020 (hereinafter, the “Property”).

20. On or about February 20, 2008, PPB issued a loan to developer Sunset 100 Limited Partnership (hereinafter, “Sunset 100 LP”) for the acquisition and development of residential condominiums to be known as the “Sunset 121 Condominiums”.

21. After Sunset 100 LP purchased the Property, on or about March 10, 2009, it retained Landsverk Quality Homes, Inc., (hereinafter, “Landsverk”) as the general contractor for the development of the Property. Landsverk began its work in the spring of 2009.

22. During the construction, Sunset 100 LP and Landsverk became involved in a dispute over billing, payment and alleged onsite construction problems. The dispute culminated in Sunset 100 LP terminating Landsverk's contract.

23. On or about on June 15, 2011, Sunset 100 LP retained another contractor to complete the construction. Certificates of occupancy were issued on January 11, 2012.

24. Sunset 100 LP then started marketing the units for sale to the general public.

25. Sunset 100 LP defaulted on the PPB construction loan.

26. As a result of Sunset 100 LP's default on the PPB construction loan, beginning in the spring of 2012, PPB and Sunset 100 LP engaged in an ongoing dialogue to resolve the default. These discussions resulted in Sunset 100 LP executing a deed in lieu of foreclosure.

27. PPB formed PPB Sunset LLC for the purpose finalizing any remaining construction of the Property, managing the Property until the individual units were sold to buyers, and selling the individual units of the Property.

28. On or about April 20, 2012, PPB assigned its ownership interest in the Property to PPB Sunset LLC.

29. PPB and/or PPB Sunset LLC formed Sunset 121 Condominium Association, (hereinafter "Association"). PPB officers Chuck Dodd and Megan Reed served as the initial directors and officers of the Association.

30. PPB Sunset LLC was identified as "successor declarant" in the transfer documents filed with the Snohomish County Auditor's office.

**B. The Underlying Action**

31. On June 16, 2014, the Underlying Complaint was filed against PPB, PPB Sunset LLC, and Sunset 100 LP. On October 22, 2015, filed a Motion to Amend their Complaint to add Chuck Dodd and Megan Reed as Defendants.

32. In the Underlying Lawsuit, the Plaintiffs allege that the Property suffers from construction defects that have caused damage to the Property, including water intrusion.

33. The underlying Plaintiffs allege that PPB and PPB Sunset LLC were “Successor Declarants” to Sunset 100 LP and that PPB and PPB Sunset LLC participated in and completed the construction of the Property and also marketed and sold the units to the Plaintiffs.

34. The Underlying Lawsuit further alleges that PPB and PPB Sunset LLC obtained an ownership interest in the Property prior to completion of the construction of the Property.

35. It is further alleged that PPB and PPB Sunset LLC “explicitly or implicitly” represented that the Property complied with existing building codes and regulations. It is further alleged that PPB and PPB Sunset LLC breached the implied warranties that the construction and materials of the Property were free from defects and that the Property was constructed in a workmanlike manner.

36. The Underlying Lawsuit further alleges that Chuck Dodd and Megan Reed were fiduciaries to the unit purchasers and as such, were required to put the needs and interests of the unit purchasers and owners before their own. The Plaintiffs allege that they were harmed by Chuck Dodd and Megan Reed’s breach of that fiduciary duty.

37. Upon information and belief, the Underlying Plaintiffs contend that costs associated with construction defects exceed \$1,000,000.

**C. Tender of the Underlying Action and Travelers’ Agreement to Defend**

38. PPB, PPB Sunset LLC, Chuck Dodd, and Megan Reed have each tendered the Underlying Lawsuit to Travelers seeking defense and indemnity under the policies that are the subject of this lawsuit.

39. Travelers has agreed to defend PPB, PPB Sunset LLC, Chuck Dodd, and Megan Reed subject to an express reservation of rights.

#### **IV. POLICIES OF INSURANCE**

##### **A. The Commercial General Liability (CGL) Policies**

40. Travelers a Commercial General Liability policy issued to PPB, Policy Number H-660-6472X548-TIL-11, which first incepted on May 1, 2011. The policy was subsequently renewed for policy years through May 1, 2015.

41. The CGL Policies contain the following insuring agreement:

##### **SECTION I – COVERAGES**

##### **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

##### **1. Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
- (2) The "bodily injury" or "property damage" occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.



- d.** "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

  - (1)** Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
  - (2)** Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
  - (3)** Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

Travelers CGL Policies, Form CG 00 01 10 01.

57. The insuring agreement quoted above is subject to the following relevant definitions:

#### **SECTION V – DEFINITIONS**

- 13.** "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

Travelers CGL Policies, Form CG 00 01 10 01.

58. An endorsement, Form CG D4 19 07 08, modifies the definition of "property damage", as follows:

"Property damage" means:

- a.** Physical damage to tangible property of others, including all resulting loss of use of that property. All such loss of use will be deemed to occur at the time of the physical damage that caused it; or

- b. Loss of use of tangible property of others that is not physically damaged. All such loss of use will be deemed to occur at the time of the "occurrence" that caused it.

Travelers CGL Policies, Endorsement, Form CG D4 19 07 08.

59. The CGL Policies contain the following provisions regarding who may qualify as an insured:

## **SECTION II – WHO IS AN INSURED**

- 1. If you are designated in the Declarations as:

...

- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

...

- 4. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, of which you are the sole owner or in which you maintain the majority ownership interest, will qualify as a Named Insured if there is no other insurance which provides similar coverage to that organization. However:

- a. Coverage under this provision is afforded only:

- (1) Until the 180th day after you acquire or form the organization or the end of the policy period, if you do not report such organization in writing to us within 180 days after you acquire or form it; or
    - (2) Until the end of the policy period, when that date is later than 180 days after you acquire or form such organization, if you report such organization in writing to us within 180 days after you or form it, and we agree in writing that it will continue to be a Named Insured until the end of the policy period;

- b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization;

Travelers CGL Policies, Form CG 00 01 10 01, as modified by Form CG D5 52 05 11.

57. The CGL Policies contain an endorsement, Form CG D5 51 02 11, that excludes coverage for the following related to foreclosed properties:

**Foreclosed Property**

"Bodily injury" or "property damage" arising out of:

- (1) The ownership, maintenance or use of "foreclosed property";
- (2) Operations related to the ownership, maintenance or use of "foreclosed property"; or
- (3) Fiduciary or representative duties related to "foreclosed property".

- 4. The following is added to the **DEFINITIONS** Section:

"Foreclosed property" means any premises that you:

- a. Obtain by legal enforcement of a lien through a foreclosure proceeding;
- b. Obtain by getting a deed in lieu of foreclosure; or
- c. Hold as a "mortgagee in possession".

"Mortgagee in possession" means the holder of a mortgage on land, or on a building or other structure, who is in possession, or who has assumed the care, custody or control, of such land, building or other structure on behalf of the mortgagor, with the agreement or assent of the mortgagor.

Policy Form CG D5 51 02 11.

58. The CGL Policies contain the following exclusions that may operate to limit or preclude coverage:

**2. Exclusions**

This insurance does not apply to:

**a. Expected Or Intended Injury**

“Bodily injury” or “property damage” expected or intended from the standpoint of the insured. [...]

**b. Contractual Liability**

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed by you in a contract or agreement that is an "insured contract", provided that the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed by you in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured will be deemed to be damages because of "bodily injury" or "property damage", provided that:
  - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed by you in the same "insured contract"; and
  - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

...

**j. Damage To Property**

“Property damage” to:

- (1) Property you own, rent, or occupy, including any

costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

For purposes of this paragraph, "foreclosed property" will be deemed to be property you own.

...

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations;

**k. Damage To Your Product**

"Property damage" to "your product" arising out of it or any part of it.

**l. Damage To Your Work**

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

**m. Damage To Impaired Property Or Property Not Physically Injured**

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

**n. Recall of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

CGL Policies, Form CG 00 01 10 01, as modified by Forms CG D4 21 07 08, CG D5 51 02 11.

59. The CGL Policies contain the following definitions that apply to the foregoing exclusions:

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

- a. The repair, replacement, adjustment or removal of "your product" or "your work"; or
- b. Your fulfilling the terms of the contract or agreement.

**9.** “Insured contract” means

...

- f. That part of any other contract or agreement pertaining to your business [...] under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;

**21.** “Your product”:

**a.** Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) A person or organization whose business or assets you have acquired; and

**b.** Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
- (2) The providing of or failure to provide warnings or instructions.

**22.** “Your work”:

**a.** Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

**b.** Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- (2) The providing of or failure to provide warnings or instructions.

Travelers CGL Policies, Form CG 00 01 10 01.

60. The CGL Policies contain an endorsement that excludes coverage for the following related to fungi and bacteria:

**Fungi or Bacteria**

- a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents.
- b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for consumption.

Policy Form CG F2 41 05 02.

61. The CGL Policies also contain the following provisions that may be applicable to the subject claims:

**AMENDMENT NON CUMULATION OF EACH  
OCCURRENCE LIMIT OF LIABILITY and  
NON CUMULATION OF PERSONAL and ADVERTISING  
INJURY LIMIT**

This endorsement modifies insurance provided under the following:



**COMMERCIAL GENERAL LIABILITY COVERAGE PART**

- 1.** Paragraph 5 of SECTION III LIMITS OF INSURANCE, is amended to include the following:

Non cumulation of Each Occurrence Limit -- If one "occurrence" causes "bodily injury" and/or "property damage" during the policy period and during the policy period of one or more prior and/or future policies that include a commercial general liability coverage part for the insured issued by us or any affiliated insurance company, the amount we will pay is limited. This policy's Each Occurrence Limit will be reduced by the amount of each payment by us and any affiliated insurance company under the other policies because of such "occurrence".

Travelers CGL Policies, Endorsement, Form CG D2 03 12 97.

**LIMITATION WHEN TWO OR MORE POLICIES APPLY TO THE SAME CLAIM OR SUIT**

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY PART**

The following is added to **SECTION III – LIMITS OF INSURANCE**:

When this Coverage Part and any Coverage Part in any other policy written by us or any of our affiliated insurance companies issued to:

- a.** You;
- b.** Any organization in which you own more than a 10% interest;  
or
- c.** Any person or organization that owns more than a 10% interest in you;

apply or applied to the same claim or "suit", the most we will pay for the sum of all amounts subject to the limits of insurance is the highest limit of insurance that applies or applied to such claim or "suit" under any one of those Coverage Parts.

However, this provision does not apply if the other Coverage Part that applies or applied is umbrella insurance, or excess insurance, that was bought specifically to apply in excess of the applicable limits of insurance shown in the Declarations of this Coverage Part.

Travelers CGL Policies, Endorsement, Form CG D4 24 07 08.

**4. Other Insurance**

If valid and collectible other insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as described in Paragraphs a. and b. below.

As used anywhere in this Coverage Part, other insurance means insurance, or the funding of losses, that is provided by, through or on behalf of:

- (i) Another insurance company;
- (ii) Us any or any of our affiliated insurance companies [...]
- (iv) Any self-insurance method or program, including any failure to buy insurance, or decision to not buy insurance, for any reason, in which case the insured will be deemed to be the provider of other insurance; or
- (v) Any similar risk transfer or risk management method.

Other insurance does not include umbrella insurance, or excess insurance, that was bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

As used anywhere in this Coverage Part, other insurer means a provider of other insurance. As used in Paragraph **c.** below, insurer means a provider of insurance.

**a. Primary Insurance**

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

**b. Excess Insurance**

This insurance is excess over:

...

- (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

Travelers CGL Policies, Form CG 00 01 10 01, as modified by Form CG D4 20 07 08.

**B. Travelers' Foreclosed Property Policies**

62. Travelers issued a Foreclosed Property policy to PPB, Policy Number H-660-6952X57A-TCT-11, which first inceptioned on May 1, 2011. The Foreclosed Property Policy was renewed in subsequent policy years through May 1, 2015.

63. The Foreclosed Property Policies contain the following insuring agreement:

**SECTION I – COVERAGES**

**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**1. Insuring Agreement**

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property

damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.

But:

- (1) The amount we will pay for damages is limited as described in Section **III** — Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

**b.** This insurance applies to “bodily injury” and “property damage” only if:

- (1) The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”;
- (2) The “bodily injury” or “property damage” occurs during the policy period and arises out of:
  - (a) The ownership, maintenance or use of “scheduled foreclosed property”;
  - (b) Operations related to the ownership, maintenance or use of “scheduled foreclosed property”; or
  - (c) Your fiduciary or representative duties related to “scheduled foreclosed property”; and
- (3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** — Who Is An Insured and no “employee” authorized by you to give or receive notice of an “occurrence” or claim, knew that

the “bodily injury” or “property damage” had occurred, in whole or in part. If such a listed insured or authorized “employee” knew, prior to the policy period, that the “bodily injury” or “property damage” occurred, then any continuation, change or resumption of such “bodily injury” or “property damage” during or after the policy period will be deemed to have been known prior to the policy period.

CG 00 01 10 01 at page 1, as amended by CG D5 47 02 11 (for 2011-12 Foreclosed Property Policy), CG D5 47 05 12 (for 2012–13 and 2013-14 Foreclosed Property Policies) and CG D5 47 01 14 (for 2014-15 Foreclosed Property Policy).

64. The definitions applicable to this coverage part for the terms are substantially the same as those set forth in Paragraphs 57-58 above. The Foreclosed Property Policies also contain the following definitions applicable to the above Insuring Agreement:

“Foreclosed property” means any premises that any insured:

- a. Obtains by legal enforcement of a lien through a foreclosure proceeding;
- b. Obtains by getting a deed in lieu of foreclosure; or
- c. Holds as a “mortgagee in possession”.

...

“Mortgagee in possession” means the holder of a mortgage on land, or on a building or other structure, who is in the possession, or who has assumed the care, custody or control, of such land, building or other structure on behalf of the mortgagor, with the agreement or assent of the mortgagor.

CG D5 47 02 11, at page 3 of 3 (2011-2012 Foreclosed Property Policy); CG D5 47 05 12 at page 3 of 4 (2012-2013 and 2013-2014 Foreclosed Property Policies); and CG D5 47 01 14 at page 3 of 4 (2014-2015 Foreclosed Property Policy).

“Scheduled foreclosed property” means “foreclosed property” that is shown in the Schedule – Covered Foreclosed Property.

CG D5 47 02 11 at page 3 of 3 (2011-2012 Foreclosed Property Policy).

“Newly acquired foreclosed property” means any “foreclosed property” that you newly acquire, but only until any of the following first occurs:

- a. This policy is canceled or expires;
- b. Ten days expire after any insured acquires title to, or takes possession of, such property;
- c. There is other insurance available to you for damages because of “bodily injury”, “property damage”, “personal injury” or “advertising injury” arising out of such property; or
- d. You report such property to us and we agree in writing that it will be covered until the end of the policy period. Such property will be deemed to be shown in the Schedule – Covered Foreclosed Property as of the date we agree that it will continue to be covered.

[...]

“Scheduled foreclosed property” means any:

- a. “Foreclosed property” that is shown in the Schedule – Covered Foreclosed Property; or
- b. “Newly acquired foreclosed property”.

CG D5 47 05 12 at pages 3-4 (2012-2013 and 2013-2014 Foreclosed Property Policies); and CG D5 47 01 14 at pages 3-4 (2014-2015 Foreclosed Property Policy).

65. The Foreclosed Property Policies identify “Who Is An Insured” in the same manner as set forth above in Paragraph 59.

66. The Foreclosed Property Policies also contain specific exclusions that may operate to preclude coverage for the subject loss that are identical to or substantially the same as those discussed above in regard to the CGL Policies, including but not limited to the following:

- The “Expected or Intended Damage” Exclusion;<sup>1</sup>
- The “Liability Assumed in Contract” Exclusion;<sup>2</sup>
- The “Damage to Your Work” Exclusion;<sup>3</sup>

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<sup>1</sup> Form CG 00 01 10 01

<sup>2</sup> Form CG 00 01 10 01 at page 2, as modified by CG D4 21 07 08.

<sup>3</sup> Form CG 00 01 10 01

- The “Damage to Your Product” Exclusion;<sup>4</sup>
- The “Damage to Impaired Property or Property Not Physically Injured” Exclusion;<sup>5</sup>
- The “Recall of Products, Work or Impaired Property” Exclusion;<sup>6</sup>
- The “Washington Fungi or Bacteria Exclusion”;<sup>7</sup>

67. The following exclusion applies to Travelers’ Foreclosed Property Policies:

**j. Damage To Property**

“Property Damage” to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property;

For purposes of this paragraph, “scheduled foreclosed property” will be deemed to be property you own.

For purposes of this paragraph, “fiduciary property” will be deemed to be property you own.

- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

...

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or

Travelers Foreclosed Property Policies, CG 00 01 10 01 at pages 4-5, as modified by CG D5 47 02 11 at page 2 (2011-2012 Policy), CG D5 47 05 12 at page 2 (2012-2013 and 2013-2014 Policies), and CG D5 47 01 14 at page 2 (2014-2015 Policy).

68. The Foreclosed Property Policies contain the following exclusions pertaining to Scheduled Foreclosed Property, as that term is defined:

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<sup>4</sup> Form CG 00 01 10 01

<sup>5</sup> Form CG 00 01 10 01

<sup>6</sup> Form CG 00 01 10 01

<sup>7</sup> CG F2 41 05 02

### **Prior Occurrences – Scheduled Foreclosed Property**

“Bodily injury” or “property damage” arising out of:

- (1) The ownership, maintenance or use of “scheduled foreclosed property”;
- (2) Operations related to the ownership, maintenance or use of “scheduled foreclosed property”; or
- (3) Fiduciary or representative duties related to “scheduled foreclosed property”;

if the “bodily injury” or “property damage” is caused by an “occurrence” that took place before the “acquisition date” of such “scheduled foreclosed property”.

Travelers Foreclosed Property Policies, CG D5 47 02 11 at page 2 (2011-2012 Policy); CG D5 47 05 12 at page 2 (2012-2013 and 2013-2014 Policies); CG D5 47 01 14 at page 2 (2014-2015 Policy).

### **Products Or Completed Operations–Foreclosed Property**

“Bodily injury” or “property damage” arising out of:

- (1) “Your product”;
- (2) “Your work” and included in the “products-completed operations hazard”;
- (3) Any goods or products manufactured, sold, handled, distributed or disposed of by others, or any containers, materials, parts or equipment furnished in connection with such goods or products; or
- (4) Work or operations performed by others that have been completed, or materials, parts or equipment furnished in connection with such work or operations;

with respect to operations related to the ownership, maintenance or use of “scheduled foreclosed property”.

Travelers Foreclosed Property Policies, CG D5 47 02 11 at page 2 (2011-2012 Policy); CG D5 47 05 12 at page 2 (2012-2013 and 2013-2014 Policies); CG D5 47 01 14 at page 3 (2014-2015 Policy).

### **Community Bank Financial Professional Services**

“Bodily injury” or “property damage” arising out of providing or failing to provide “community bank financial professional services” by any insured to others.



...

**3.** The following is added to the **DEFINITIONS** Section:

“Community bank financial professional services” means any of the professional services that any insured provides or is required to provide:

- a.** For any insured’s customer, including insurance services, investment services, real estate services, tax services, trust services and other similar services, under:
  - (1)** An agreement between any insured and the customer; or
  - (2)** A written contract or agreement between the insured and a third party in which any insured agrees to provide such services for the customer on behalf of the third party; or
- b.** In connection with any loan, lease, extension of credit, deposit account, safe deposit box, lock box, money transfer, travelers, check, certified check, bank check, money order or other similar monetary instrument.

CG D5 63 02 11 - 2011-2012 and 2012-2013 Foreclosed Property Policies.

**Professional Community Bank Financial Services**

“Bodily injury” or “property damage” arising out of providing or failing to provide professional “community bank financial services” by any insured to others.

This exclusion does not apply to:

- (4)** ...  
“Bodily injury” or “property damage” arising out of the act of taking possession of real or personal property in connection with any of the following operations or activities:
  - (a)** Lending;
  - (b)** Leasing; or
  - (c)** Extension of credit.

...

**3.** The following is added to the **DEFINITIONS** Section:

“Community bank financial services” includes:

- a. Any of the services that any insured provides or is required to provide for any insured's customer, including insurance services, investment services, real estate services, tax services, trust services and other similar services, under:
  - (1) An agreement between any insured and the customer; or
  - (2) A written contract or agreement between the insured and a third party in which any insured agrees to provide such services for the customer on behalf of the third party;
  - ...
- c. Evaluating, analyzing, administering, managing, advising on or servicing, or providing opinions or instructions in connection with, any of the following operations or activities:
  - (1) Lending, leasing or extension of credit;
  - ...
- e. Maintaining or providing information concerning any financial account, record or balance;
- f. Selling or issuing any travelers check, certified check, bank check, money order, other similar monetary instrument or money transfer; [...]
- ...

CG D5 63 05 12 (2012-2013, 2013-2014 and 2014-2015 Foreclosed Property Policies).

### **Fiduciary Property**

"Bodily injury" or "property damage" arising out of:

- (a) The ownership, maintenance or use of "fiduciary property";
- (b) Operations related to the ownership, maintenance or use of "fiduciary property"; or
- (c) Fiduciary or representative duties related to "fiduciary property".

...

- 5. The following is added to the **DEFINITIONS** Section:

“Fiduciary property” means any property in any conservatorship, estate, guardianship, trust or other fiduciary account for which you are acting in a fiduciary or representative capacity.

Foreclosed Property Policies, Form CG D5 67 02 11.

69. Each of the Foreclosed Property Policies contain the same or substantially similar coverage terms and provisions for “Other Insurance”, Limitation When Two or More Policies Apply, and “Non-Cumulation” as is discussed above in regard to the CGL Policies. Each of these provisions may operate to limit or bar coverage under the Foreclosed Property Policies.

**C. Travelers’ Excess Liability Policies**

70. Travelers issued Excess Liability Policies to PPB under Policy Number HSM-CUP-7700X062-TIL-11 for policy period May 1, 2011 through May 1, 2012 (hereinafter the “2011-2012 Excess Policy”).

71. Subsequently, Travelers issued Excess Liability Policy Number HSM-CUP-7700X062-TIL-12 to PPB for policy period May 1, 2012 through May 1, 2013 (hereinafter the “2012-2013 Excess Policy”). Travelers then issued Policy Number HSM-CUP-7700X062-TIL-13 to PPB for policy period May 1, 2013 through May 1, 2014 (hereinafter the “2013-2014 Excess Policy”). Lastly, Travelers issued Policy Number HSM-CUP-7700X062-TIL-14 to PPB for policy period May 1, 2014 through May 1, 2015 (hereinafter the “2014-2015 Excess Policy”).

72. The Excess Policies are following form type policies that provide coverage pursuant to the same general terms and conditions as the underlying primary insurance. To the extent that there is no coverage available under any underlying primary insurance, there would be no coverage available under the Excess Policies.

73. The insuring agreement in the Excess Policies provide as follows:

**COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY; and COVERAGE B. PERSONAL INJURY AND ADVERTISING INJURY LIABILITY**

**1. INSURING AGREEMENT.**

- a.** We will pay on behalf of the insured the "ultimate net loss" in excess of the "applicable underlying limit" which the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies.

This insurance applies to "bodily injury" or "property damage" only if:

- (i)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place anywhere in the world;
- (ii)** The "bodily injury" or "property damage" occurs during the policy period;
- (iii)** Prior to the policy period, no insured listed under Paragraph **1.** of **SECTION II — WHO IS AN INSURED** and no employee authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized employee knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

Excess Policies, Form UM 00 01 11 03, p. 1.

74. The Excess Policies contain the following definitions that apply to the foregoing Insuring Agreement:

**3.** "Applicable underlying limit" means:

- a.** If the policies of "underlying insurance" apply to the "occurrence" or "offense", the greater of:

- (1) The amount of insurance stated in the policies of "underlying insurance" in the Declarations or any other available insurance less the amount by which any aggregate limit so stated has been reduced solely due to payment of claims; or
    - (2) The "retained limit" shown in the Declarations; or
  - b. If the policies of "underlying insurance" do not apply to the "occurrence" or "offense", the amount stated in the Declarations as the "retained limit".
16. "Ultimate net loss" means the sum actually paid or payable due to a claim for which the insured is liable either by a settlement to which we agreed or a final judgment. Such sum will include proper adjustments for recoveries and salvage.

Excess Policies, Form UM 00 01 11 03, pp. 11-13.

75. The Excess Policies also contain the following provisions with regard to the duty to defend:

**2. DEFENSE OF CLAIMS OR SUITS**

- a. We will have no duty to defend any claim or "suit" that any other insurer has a duty to defend. If we elect to join in the defense of such claims or "suits", we will pay all expenses we incur.
- b. We will have the right and duty to defend any "suit" for damages which are payable under Coverages **A** or **B** (including damages wholly or partly within the "retained limit") but which are not payable by a policy of "underlying insurance", or any other available insurance, because:
  - (1) Such damages are not covered; or
  - (2) The "underlying insurance" has been exhausted by the payment of claims.
- c. We may investigate and settle any claim or "suit" in **b.** above at our discretion.

- d. Our right and duty in b. above end when we have used up the "applicable limit of insurance" in the payment of judgments or settlements.

Excess Policies, Form UM 00 01 11 03, p. 2.

76. Finally, the Excess Policies contain the following Endorsement relating to Foreclosed Properties:

The following exclusion is added to Paragraph 3., **EXCLUSIONS.**, of **SECTION I — COVERAGES — COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY; and COVERAGE B. PERSONAL INJURY AND ADVERTISING INJURY LIABILITY.:**

**Foreclosed Property**

- (1) "Bodily injury", "property damage", "personal injury" or "advertising injury" arising out of:
  - (a) The ownership, maintenance or use of "foreclosed property";
  - (b) Operations related to the ownership, maintenance or use of "foreclosed property"; or
  - (c) Fiduciary or representative duties related to "foreclosed property".
- (2) "Property damage" to "foreclosed property".

This exclusion does not apply to "bodily injury", "property damage", "personal injury" or "advertising injury" to which any policy of Commercial General Liability (CGL) "underlying insurance" listed in the SCHEDULE OF UNDERLYING INSURANCE of the DECLARATIONS of this insurance, or any renewal or replacement thereof, would apply but for the exhaustion of its limits of liability.

- 2. The following is added to **SECTION V — DEFINITIONS.:**

"Foreclosed property" means any premises that any insured:

- a. Obtains by legal enforcement of a lien through a foreclosure proceeding;

- b. Obtains by getting a deed in lieu of foreclosure; or
- c. Holds as a "mortgagee in possession".

"Mortgagee in possession" means the holder of a mortgage on land, or on a building or other structure, who is in the possession, or who has assumed the care, custody or control, of such land, building or other structure on behalf of the mortgagor, with the agreement or assent of the mortgagor.

Excess Policies, Form UM 05 80 02 11.

**V. THERE IS NO COVERAGE AVAILABLE UNDER ANY TRAVELERS POLICY**

57. The Travelers Policies provide coverage pursuant to their terms and conditions and not otherwise.

58. There is no coverage available under any Travelers Policy for any actual or alleged insured for the claims alleged in the Underlying Lawsuit.

59. The CGL Policies expressly exclude "property damage" arising out, or operations related to, the ownership, maintenance or use of "foreclosed property."

60. There exists an actual and justiciable controversy as to whether the claims asserted in the Underlying Lawsuit involve "property damage" arising out, or operations related to, the ownership, maintenance or use of "foreclosed property" as those terms are defined.

61. The Foreclosed Property Policies provide coverage only for "property damage" arising out of the ownership, maintenance or use of "scheduled foreclosed property" or the insured's fiduciary or representative duties related to "scheduled foreclosed property".

62. There exists an actual and justiciable controversy as to whether the claims asserted in the Underlying Action involve "property damage" arising out of, or operations related to, the ownership, maintenance or use of "scheduled foreclosed property" as that term is defined the Foreclosed Property Policies.

63. The Insuring Agreements in each of the Travelers Policies provide coverage for “property damage” occurring during the policy period, caused by an “occurrence”, provided that no insured had any knowledge of the potential “property damage” prior to the inception of the Travelers Policies.

64. There exists an actual and justiciable controversy as to whether the claims asserted in the Underlying Lawsuit trigger the Insuring Agreements in any Travelers Policy.

65. The Travelers Policies only provide coverage for persons or entities that qualify as an insured pursuant to the terms and conditions of each such Policy.

66. There is an actual and justiciable controversy as to whether some or all of the above-named defendants qualify as an insured pursuant to the terms and conditions of the subject policies.

67. Each of the Travelers Policies specifically exclude coverage pursuant to the following exclusions as detailed herein:

- The “Expected or Intended Damage” Exclusion;
- The “Liability Assumed in Contract” Exclusion;
- The “Damage to Your Work” Exclusion;
- The “Damage to Your Product” Exclusion;
- The “Damage to Impaired Property or Property Not Physically Injured” Exclusion;
- The “Recall of Products, Work or Impaired Property” Exclusion;
- The “Washington Fungi or Bacteria Exclusion”;
- The “Damage to Property” Exclusion.

68. There exists an actual and justiciable controversy as to whether the foregoing exclusions operate to preclude coverage for some or all of the above-named defendants.

69. Pursuant to the Prior Occurrences Exclusion in the Foreclosed Property Policies, coverage is precluded for “property damage” arising out of “scheduled foreclosed property,” if



the “property damage” is caused by an “occurrence” that first took place before the “acquisition date” of the “scheduled foreclosed property.”

70. There exists an actual and justiciable controversy as to whether any alleged “property damage” in the Underlying Action took place before any insured acquired the Property.

71. The Foreclosed Property Policies contain an exclusion for Community Bank Financial Professional Services or Professional Community Bank Services. According to those exclusions, coverage is excluded for “property damage” arising out of providing or failing to provide “community bank financial services” or “community bank financial professional services” as those terms are defined.

72. There is an actual and justiciable controversy as to whether property damage alleged in the Underlying Action arises out of providing or failing to provide “community bank financial services” or “community bank financial professional services.”

73. Pursuant to the Foreclosed Property Policies, coverage is excluded for “property damage” arising out the ownership, maintenance or use of “fiduciary property” as those terms are defined. To the extent the Underlying Action alleges that the property damage arises out of PPB, PPB Sunset LLC, Chuck Dodd and/or Megan Reed’s ownership, maintenance or use of “fiduciary property” there may be no coverage available.

74. There is an actual and justiciable controversy as to whether the Underlying Action alleges property damage arising out of the ownership, maintenance or use of “fiduciary property”.

75. The Excess Policies provide coverage pursuant to the same general terms and conditions as the underlying primary insurance. To the extent that coverage is not available

under any underlying primary insurance policy, there would be no coverage available under the Excess Policies

76. There exists an actual and justiciable controversy as to whether there is any coverage available under any of the Excess Policies.

77. The Excess Policies provide coverage for the “Ultimate Net Loss” in excess of the “applicable underlying limit” that the insured becomes legally liable to pay as damages for “bodily injury” or “property damage”.

78. There exists an actual and justiciable controversy as to whether the applicable underlying limit from any of the CGL and/or Foreclosed Property Policies has been exhausted.

79. If the Excess Policies are triggered, the right and duty to defend will be subject to the applicable policy language in the Defense Of Claims Or Suits provision in the Excess Policies.

80. There exists an actual and justiciable controversy as to whether the Excess Policies are triggered.

81. The Travelers Policies contain an “Amendment – Non Cumulation of Each Occurrence Limit of Liability” limiting applicable policy limits available for property damage which commences in a prior policy period.

82. To the extent there is any coverage available to Defendants under the Travelers Policies, there exists an actual and justiciable dispute as to whether the “Amendment – Non Cumulation of Each Occurrence Limit of Liability” in the Travelers Policies applies and limits any available policy limits to the single per occurrence limit of any one Travelers Policy.

83. Other insurance may be available to the defendants. Therefore, there is an actual and justiciable controversy as to whether the Travelers Policies are excess to any other insurance available to defendants.

**VI. CAUSE OF ACTION - REQUEST FOR DECLARATORY RELIEF**

84. Actual and justiciable controversies exist as to whether any coverage is available to PPB, PPB Sunset LLC, Chuck Dodd and/or Megan Reed under any of the Travelers' Policies, as set forth above.

85. Pursuant to and in accordance with 28 U.S.C. §2201, Travelers requests that the Court grant declaratory relief in favor of Travelers and that the Court enter a judicial declaration that Travelers has no obligation to provide a defense or any indemnity to any actual or alleged insured for the claims asserted in the Underlying Lawsuit.

**VII. PRAYER FOR RELIEF**

Wherefore, Travelers having specifically alleged the foregoing, now prays for the following relief:

86. For a declaration and judicial determination that no coverage exists for any damages alleged in the Underlying Action pursuant to the terms and conditions of the Travelers Policies.

87. For attorneys' fees and costs as may be allowed by statute and law.

88. For all interest allowed by law.

89. For any other relief as the Court deems to be just and equitable.

DATED this 14<sup>th</sup> day of September, 2016.

LEATHER & ASSOCIATES, PLLC

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/s/ Eric J. Neal

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